IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

INTERNATIONAL HARVESTER COMPANY and INTERNATIONAL HARVESTER COMPANY OF AMERICA, *Appellants*, *v.* DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON, and FRANK G. THOMPSON, as Members and Constituting the Board of Department of Treasury, *Appellees.*	No. 355.

APPELLANTS' PETITION FOR RE-HEARING.

International Harvester Company and International Harvester Company of America, Appellants in the above appeal, hereby respectfully petition for a re-hearing.

As agreed to in the Stipulation of Facts (R. 24-25) we shall in this Petition, as in the briefs already filed, treat the International Harvester Company as the sole party plaintiff and appellant, and shall hereafter use the word "Appellant" in this Petition as covering both companies.

This Petition is restricted to the question of the tax on Class D sales.

Class D sales are sales by the branches of Appellant in Indiana, namely, the branches at Fort Wayne, Evansville and Terre Haute, which have territory outside Indiana, to dealers and consumers residing outside Indiana, who came to Indiana and took delivery of the goods themselves in Indiana, and then transported their goods to their homes in Kentucky, Ohio, and Illinois.

More than 94% of Class D sales were wholesale sales, namely sales by the branches to dealers. In 1935, the wholesale sales were $544,902.16. The retail sales in 1935 were $21,024.71. In 1936, the wholesale sales were $546,-892.24, and the retail sales were $33,182.06. (R. 45.)

We believe that the Court's opinion is based on the following three points:

1. Referring to the tax on Class D sales, the Court states in the last sentence of the opinion: "To deny Indiana this power would be to make local industry suffer a competitive disadvantage."

We are unable to conceive of a case where local industry would suffer a competitive disadvantage if the tax on Class D sales were held invalid, and we submit that no such case can be postulated.

2. On the question of multiple taxation, the Court says, "But it will be time to cross that bridge when we come to it."

We submit that this rule is directly contrary to the rule laid down by this Court in *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307 and *Gwin, White & Prince, Inc. v.*

Henneford, 305 U. S. 434, where this Court held that unlawfulness of the burden did not depend on the contingency that a tax had already been levied on the same gross receipts by another jurisdiction.

3. The Court declares that the case is governed by the decision in *Department of Treasury, et al. v. Wood Preserving Corporation*, 313 U. S. 62, where this Court held that the Indiana Gross Income Tax could be applied to sales of railroad ties by the Wood Preserving Corporation to the Baltimore & Ohio Railroad Company.

To this we submit that the situation presented in the Wood Preserving Corporation case was exceptional and we do not believe that the rule of that case should be applied to Class D sales where it appeared that the seller and the buyers had been dealing with each other for years, and where the buyers who had contracts calling for shipment to them of the goods made their own delivery for the purpose of saving freight expense or expediting delivery or for both reasons.

We shall now take up these three points more at length—

1. The question of competitive disadvantage.

We have carefully considered the point of competitive disadvantage to local industry, in case the tax on Class D sales were held invalid, and we have been unable to see that local industry could suffer such a competitive disadvantage. We have tried to imagine a case where a local industry would be put at a competitive disadvantage if the International Harvester Company were relieved of the tax on Class D sales. We do not believe that such a competitive disadvantage can arise.

The Traffic World Map in evidence in this case shows that Evansville is the center of a wholesale trade area covering parts of Illinois, Kentucky and Indiana; that Fort Wayne is the center of a wholesale trade area which extends into Ohio counties along the Ohio-Indiana line; and that Terre Haute is the center of a trade area which includes parts of west central Indiana and east central Illinois (Plaintiff's Exhibit 2, R. 94). A similar showing is made by the map of "Wholesale Grocery Trading Areas," prepared by the United States Department of Commerce (Plaintiff's Exhibit 3, R. 95).

It is evident, therefore, that a local industry in Indiana selling to buyers in east central Illinois would be selling in the same general territory as that covered by the Appellant's Terre Haute branch. Likewise a local Indiana industry selling to buyers in southeastern Illinois and northwestern Kentucky, would be selling in the same general territory as that handled by Appellant's Evansville branch; and a local Indiana industry selling to Ohio buyers would be conducting its activities in the same general territory as Appellant's Fort Wayne branch. It might well be that local industries would have their selling offices located in Fort Wayne, Terre Haute, and Evansville, as in the case of the Appellant.

If, then, a local industry with a sales office in Terre Haute, for example, sold to a buyer in east central Illinois, the local industry would either ship the goods to the buyer by rail, or the buyer would come to Terre Haute and get the goods, as the buyers did in Class D. If the local industry in such case shipped the goods by rail to the buyer in Illinois, the sale would not be subject to the Indiana Gross

Income tax under the decision in the case of *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307.

If, therefore, the Court should hold in this case that the sales in Class D are not subject to the Indiana Gross Income tax, then in case a local industry handled its sales to purchasers in Class D territory in the same manner as International Harvester Company handled them, the local industry would not be subject to the Indiana Gross Income tax on such sales.

We fail to see, therefore, how a local industry could be put at a competitive disadvantage if the tax on Class D sales were held invalid.

We do not believe that the Court means to say that a local industry would suffer a "competitive disadvantage" because it will pay a local tax if it makes an intrastate sale from an office in Illinois to a buyer in Illinois, or from an office in Ohio to a buyer in Ohio, or from an office in Kentucky to a buyer in Kentucky, whereas if the tax on Class D sales is held invalid, the International Harvester Company would pay no tax. By a parity of reasoning *any* exemption of an interstate transaction from a local tax because of the commerce clause would create a "competitive disadvantage" against an intrastate transaction. It is obviously not possible to obtain competitive equality between local tax burdens on intrastate sellers in different states. One state may have a 3% sales tax and another state no sales tax. The tax systems in the digerent states vary greatly, and we submit that it is impossible to obtain competitive equality between a local seller in Indiana and a local seller in Illinois or Kentucky or Ohio.

As a matter of fact, however, Kentucky has no sales tax, wholesale or retail. Moreover, the Illinois Retailers' Occupation Tax applies only to sales at retail, namely, sales to the consumer. (Smith-Hurd Ill. Stat., ch. 120, § 440.) Likewise, Ohio has no tax on wholesale sales. The Ohio sales tax applies to sales to the consumer only, and even the retail tax does not apply to sales of agricultural implements and machines. (General Code of Ohio, § 5546-1.)

We have already seen that 94% of the sales in Class D were wholesale sales.

Therefore the result of sustaining the tax on Class D sales will be to subject the Appellant to a tax on wholesale sales which a competitor would not pay on intrastate sales made in Ohio, Kentucky or Illinois, and, further, to subject the Appellant to a tax on retail sales which a competitor making a local sale in Kentucky would not pay, and a competitor making an intrastate sale of agricultural implements in Ohio would not pay.

We conclude that the fear of a competitive advantage to the Appellant is groundless.

2. *The Question of Multiple Taxation.*

We submit that the statement of the Court as to multiple taxation, that it will cross the bridge of multiple taxation when it comes to it, is directly contrary to the decision of the Court in *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434. That case involved a tax by the State of Washington on gross receipts from the marketing of fruit which was shipped from the State of Washington to the places of sale in various states and foreign countries, and sold in those states and foreign countries by Gwin, White

& Prince, Inc. as the marketing agent for the fruit growers. This Court said on page 440:

> "Unlawfulness of the burden depends upon its nature measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden. . . ."

The same principle was declared in *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307. The Court said on page 311:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids."

There was no showing in the *J. D. Adams* case that there had been a tax already laid by another state.

This Court in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, declared that "The rationale of the Adams Manufacturing Co. case does not call for condemnation of the present tax" (p. 58).

In the dissenting opinion of Mr. Chief Justice Stone in *Northwest Airlines, Inc. v. State of Minnesota*, decided on the same day as the case at bar it is stated that Minnesota could not justify its

> "imposition of an undue proportion of the total tax burden which can be imposed on an interstate

> carrier by saying that other states have taken or may take less than their share of the tax. It is enough that the tax exposes petitioner to 'the risk of a multiple burden to which local commerce is not exposed', *Adams Mfg. Co. v. Storen, supra,* 311; *Gwin, White & Prince, Inc. v. Henneford, supra,* 439, and cases cited."

Taxpayers naturally have relied on the definite statement by this Court in the *Adams* case and in *Gwin, White & Prince, Inc. v. Henneford, supra,* that it is not necessary for a taxpayer to show an *actual* multiple tax if the situation is such that the taxpayer is thrown wide open to the possibility of multiple taxation.

We think it fair to say that neither the Appellee nor the Appellant in this case has been dilatory and yet it has taken until 1943 to bring before this Court an appeal based on taxes for the years 1935 and 1936. We submit that the taxpayer should not be forced to wait four or five years more in order to present to this Court definite proof of multiple taxation when the Court has vigorously held in the *Adams* and *Gwin, White & Prince* cases that such proof was not necessary.

It is as certain as any question in taxation can be that such multiple taxation will be imposed.

We note that Mr. Justice Rutledge in his concurring opinion referring to Class D sales states that whether Illinois "could impose a use tax or some other as a property tax is not presented and need not be determined."

But the threat of multiple taxation on Class D sales is not merely the threat of a use tax by the state where the buyers live. 94% of Class D sales were wholesale

sales and the use tax is never applied to wholesale sales to the dealer but merely to retail sales to the consumer.

The threat of multiple taxation in Class D sales is the threat of a sales tax by the state of the buyer when the state of delivery of the goods has already imposed a sales tax.

We showed in our Appellant's Reply Brief that we have more here in Class D than a situation where the taxpayer is exposed to the threat of multiple taxation. We showed that the State of Illinois in the summer of 1943 amended the Illinois Retailers' Occupation tax to provide specifically that the tax would be applied on retail sales where a seller with an office outside of Illinois sends his salesmen into Illinois to solicit business and where the buyers come to the seller's place of business at the office outside of Illinois, obtain the goods themselves and bring them to their homes in Illinois. It is as certain as the operation of any tax law can be that Illinois will attempt to collect the tax on retail sales in Class D.

It may be argued that the Illinois tax could not be imposed on Class D retail sales because of this Court's decision in the case of *McLeod v. J. E. Dilworth Co.* (decided the same day as the case at bar), where it said that the J. E. Dilworth Company was "through selling in Tennessee" when it shipped the goods from Memphis to the buyers in Arkansas. The situation, however, has one difference, namely, that the International Harvester Company does have places of business in Illinois, Ohio and Kentucky and the J. E. Dilworth Company had no places of business in Arkansas. We do not believe that this difference should have any effect on the application

of a tax to Class D sales since Appellant's Illinois branches, for example, have absolutely nothing to do with the Illinois territory handled by the Terre Haute branch, or the Illinois territory handled by the Evansville branch, so far as Class D sales are concerned. But although there is no office of the Appellant in Illinois which in any way touches the business just as in the Dilworth Company case the Dilworth Company had no office in Arkansas which touched its business, it can hardly be doubted that state taxing authorities will contend that because Appellant has places of business in Illinois, Kentucky and Ohio, therefore Illinois, Kentucky and Ohio can tax Class D sales.

Since we are faced with an Illinois statute taxing retail sales to Class D buyers in Illinois and since there is a definite possibility of taxes on both wholesale and retail sales to Class D buyers by Illinois, Ohio and Kentucky, we submit that it is a matter of importance that this Court grant a rehearing on the question of Class D sales.

3. *The rule in the Wood Preserving Corporation case arose from an exceptional situation and should not be applied to Class D sales.*

Finally, we submit that the case of *Department of Treasury, et al. v. Wood Preserving Corporation*, 313 U. S. 62, on which the Court strongly relies in its opinion in this appeal, has striking and material differences from the situation in the case at bar.

The situation in the *Wood Preserving Corporation* case was exceptional, and the rule in that case should not be extended to a situation such as that presented in Class D. The Wood Preserving Corporation, the seller, had no place of business in Indiana. Representatives of the Railroad Company met with representatives of the seller in

Indiana, the ties were inspected, they were loaded on cars of the Railroad Company, and shipped to the treating plant of a subsidiary company of the Wood Preserving Corporation located at Finney, Ohio. But in the case at bar the record shows that the dealers and consumers both have had long relations with the Appellant. The dealers operated under annual contracts. The contracts provided for shipment by the Appellant to the buyers (R. 34A). The shipments would come either from the factory or branch house making the sale or one of the transfer houses of Appellant, none of which was located in Indiana. In the case of retail sales of motor trucks, the contracts provide for shipment to the buyer (R. 39). In the case of a retail order for general line goods, namely, farm implements and machinery, the contracts provide for the goods to be delivered to the buyer at the seller's place of business and that the buyer agrees to pay freight "on same from .... * * *." (R. 38.) There was strong evidence in the record of a saving in freight if the buyer came to the branch and got his own goods, or if the buyer went to the factory at Fort Wayne or Richmond and got his goods and took them home with him. (Exhibit 5, R. 97, and Exhibit 6, R. 99.)

In short, the buyer and the seller were dealing with each other across state lines and had been for many years, particularly in the case of dealers. The orders were transmitted across state lines, the acceptances were transmitted across state lines, and the normal course would be for the goods to be shipped across state lines or from points outside of Indiana. More than 80% of the sales made by the Class D branches were so completed (R. 45, 101-2).

If then, obviously to save freight or to get quicker delivery, the buyer (dealer or consumer) goes to the factory

or branch and takes the goods back, the transaction, we submit, should not be burdened with a tax in that case with which it would not be burdened if the goods are shipped by rail.

No such elements were present in the *Wood Preserving Corporation* case. There was nothing to show that there had been dealings between the Wood Preserving Corporation and the Baltimore & Ohio Railroad for years, and that the normal course was for the Wood Preserving Corporation to ship the ties itself to the Railroad Company.

This Court has frequently told taxpayers that they cannot convert a normal intrastate transaction into an interstate transaction by providing unusual terms or conditions.

We submit that since Class D sales are normal *interstate* transactions, this Court should not convert a normal interstate transaction into an *intrastate* transaction simply because the buyer to save expense and time makes his own delivery. This Court has frequently held in the cases we cited on page 25 of Appellants' Brief that where goods are purchased by a buyer in one state and transported by the buyer to another state, the transaction is one in interstate commerce. We see no reason why such a transaction should not be treated as interstate commerce for the purpose of taxation as well as for all other purposes. We submit, therefore, that the tax on Class D sales should not be sustained.

In its opinion in the instant case the Court refers with approval to its per curiam decision in *Allied Mills, Inc. v. Department of Treasury*, 318 U. S. 740, affirming the decision of the Indiana Supreme Court, 42 N. E. 2d 34,

which held that the buyer's state may tax an interstate sale. Yet in the case at bar the state of delivery, which is *not* the state of the buyer, is permitted to tax Class D sales. In *McLeod v. J. E. Dilworth Company,* this Court invalidated a tax by the state of the buyer. We are therefore still without a rule of general application to guide us. All we can say is that if the precise facts of a new case fit exactly the facts of a case on which this Court has ruled, the tax result in the new case is presumably known.

The difficulty of applying conflicting rulings that the state of the buyer may tax and that the state of delivery may tax is illustrated by the recent decision of the Supreme Court of California in *Standard Oil Company v. Johnson,* 147 P. 2d 577, in which it was held that the sale of oil physically delivered to California to the buyer (a railroad company) for transportation by the buyer to another state was not a sale made in California, because the railroad in transporting the oil was acting in its capacity as a common carrier. The California Court thereby avoided the unfairness of the arbitrary rule that the state of delivery may tax. Permitting a tax by the buyer's state on delivery to the buyer there, as in the New York City cases, has a basis of fairness in that the tax falls at the place of competition. But the bald rule that the state of delivery may tax is arbitrary and unfair and should be modified.

The Indiana gross income tax is still before this Court, in *Freeman v. Hewit,* No. 788, on appeal from the Indiana Supreme Court, 51 N. E. 2d 6, in which probable jurisdiction was noted on April 3, 1944, and in *Ford Motor Company v. Department of Treasury,* No. 958, in which certiorari was granted on May 29, 1944, to review a decision of the

Circuit Court of Appeals for the Seventh Circuit, 141 F. 2d 24. Both cases involve the question of the taxability of interstate sales. It is opportune therefore that the decision as to the Class D sales of International Harvester Company be reviewed and corrected.

We respectfully petition for a rehearing by this Court on the question of the taxation of Class D sales.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 355.—October Term, 1943.

International Harvester Company and International Harvester Company of America, Appellants, *vs.* Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson, et al., etc.	Appeal from the Supreme Court of the State of Indiana.

[May 15, 1944.]

Mr. Justice Douglas delivered the opinion of the Court.

This case raises questions concerning the constitutionality of the Indiana Gross Income Tax Act of 1933 (L. 1933, p. 388, Burns Ind. Stats. Ann. § 64-2601) as construed and applied to certain business transactions of appellant companies. The suit was brought by appellants to recover gross income taxes paid to Indiana during the years 1935 and 1936. The Indiana Supreme Court sustained objections to the imposition of the tax on certain sales but allowed the tax to be imposed on other types of transactions. — Ind. —, 47 N. E. 2d 150. The correctness of the latter ruling is challenged by the appeal which brings the case here. Judicial Code § 237, 28 U. S. C. § 344(a), 28 U. S. C. § 861(a).

Appellants are corporations authorized to do business in Indiana but incorporated under the laws of other States. They manufacture farm implements and motor trucks and sell those articles both at wholesale and retail. During the period here in question they maintained manufacturing plants at Richmond and Fort Wayne, Indiana and selling branches at Indianapolis, Terre Haute, Fort Wayne, and Evansville, Indiana. They also had manufacturing plants and sales branches in adjoining States and elsewhere. Each branch had an assigned territory. In some instances parts of Indiana were within the exclusive jurisdiction of branch offices which were located outside the State. The transactions which Indiana says may be taxed without infringement of the

federal Constitution are described by the Indiana Supreme Court as follows:

> *Class C*: Sales by branches located outside Indiana to dealers and users residing in Indiana. The orders were solicited in Indiana and the customers took delivery to themselves at the factories in Indiana to save time and expense of shipping.[1]
>
> *Class D*: Sales by branches located in Indiana to dealers and users residing outside of Indiana, in which the customers came to Indiana and accepted delivery to themselves in this state.[2]
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> *Class E*: Sales by branches located in Indiana to dealers and users residing in Indiana, in which the goods were shipped from points outside Indiana to customers in Indiana, pursuant to contracts so providing.[3]

The gross income tax[4] collected on those transactions is the same one which was before this Court in *Department of Treasury*

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[1] The stipulation states that the "orders and contracts were accepted by branches outside Indiana" and payments "were received by branches outside Indiana." The Class C sales were principally sales of motor trucks manufactured at Fort Wayne and a small amount of goods manufactured at Richmond. In case of wholesale sales it is the custom for the dealer to notify the company at the time he desires delivery that he wants to take delivery of the goods himself at Fort Wayne or Richmond. In the case of retail sales in Class C, "if the user desires to undertake transportation of the goods to their destination and for that purpose to take delivery at the factory in Indiana, it is the business practice for the contract or order so to state."

[2] The stipulation states that the "orders or contracts were accepted and the sales proceeds were received by the Branch Managers at the branches located within Indiana." The business custom or practice respecting deliveries in the State to dealers or retail purchasers was the same as in case of the Class C sales.

[3] The stipulation states that the goods in this class were shipped by the company from outside the State, the order or contract specifying that "shipment should be made from a point outside Indiana to the purchaser in Indiana." In these cases, moreover, the orders were "solicited from purchasers residing in Indiana by representatives of Indiana branches, or the orders or contracts were received by mail by Indiana branches. The orders and contracts were accepted by the Branch Manager at branches located within Indiana. Payments of the sales proceeds were received by branches in Indiana. The sales in this class were of goods manufactured outside the State of Indiana."

There was no showing, moreover, that goods in this class were of kind that could be obtained only outside Indiana. It seems to be admitted that Class E sales arose when an Indiana branch received orders for goods in quantities which could not be economically carried in stock or where a cheaper freight rate could be obtained by direct shipments from outside Indiana. Cf. Bowman v. Continental Oil Co., 256 U. S. 642; Sonneborn Bros. v. Cureton, 262 U. S. 506.

[4] Sec. 2 of the Act provided in part: "There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all resi-

v. *Wood Preserving Corp.*, 313 U. S. 62 and *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307. The tax was described in the *Storen* case as "a privilege tax upon the receipt of gross income." 304 U. S. p. 311. In that case an Indiana corporation which manufactured products and maintained its home office, principal place of business, and factory in Indiana sold those products to customers in other States and foreign countries upon orders taken subject to approval at the home office. It was held that the Commerce Clause (Art. I, Sec. 8 of the Constitution) was a barrier to the imposition of the tax on the gross receipts from such sales. But as we held in the *Wood Preserving Corp.* case, neither the Commerce Clause nor the Fourteenth Amendment prevent the imposition of the tax on receipts from an intrastate transaction even though the total activities from which the local transaction derives may have incidental interstate attributes.

The objections under the Commerce Clause and the Fourteenth Amendment to the tax on the receipts from the three classes of sales involved here are equally without merit.

In the *Wood Preserving Corp.* case contracts were made outside Indiana for the sale of railroad ties. The respondent-seller, a Delaware corporation with its principal place of business in Pennsylvania, obtained the ties from producers in Indiana and delivered them to the buyer (Baltimore & Ohio Railroad Co.) in Indiana who immediately loaded them on cars and shipped them out of the State. Payments for the ties were made to the seller in Pennsylvania. We held that Indiana did not exceed its constitutional authority when it laid the tax on the receipts from those sales.

We see no difference between the sales in the *Wood Preserving Corp.* case and the Class C sales in the present one which is translatable into a difference in Indiana's power to tax. The fact that the sales in Class C are made by an out-of-state seller and that

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dents of the state of Indiana, and upon the gross income derived from sources within the state of Indiana, of all persons and/or companies, including banks, who are not residents of the state of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities." The language of this section was recast by L. 1937, c. 117, § 2, p. 611.

Sec. 6(a) of the Act exempted "so much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, to the extent to which the state of Indiana is prohibited from taxing under the Constitution of the United States of America." And see L. 1937, c. 117, § 6, p. 615.

the contracts were made outside the State is not controlling. Here as in the *Wood Preserving Corp.* case, delivery of the goods in Indiana is an adequate taxable event. When Indiana lays hold of that transaction and levies a tax on the receipts which accrue from it, Indiana is asserting authority over the fruits of a transaction consummated within its borders. These sales, moreover, are sales of Indiana goods to Indiana purchasers. While the contracts were made outside the State, the goods were neither just completing nor just starting an interstate journey. It could hardly be maintained that Indiana could not impose a sales tax or a use tax on these transactions. But, as we shall see, if that is the case, there is no constitutional objection to the imposition of a gross receipts tax by the State of the buyer.

The Class D sales are sales by an Indiana seller of Indiana goods to an out-of-state buyer who comes to Indiana, takes delivery there and transports the goods to another State. The *Wood Preserving Corp.* case indicates that it is immaterial to the present issue that the goods are to be transported out of Indiana immediately on delivery. Moreover, both the agreement to sell and the delivery took place in Indiana. Those events would be adequate to sustain a sales tax by Indiana. In *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, we had before us a question of the constitutionality of a New York City sales tax as applied to purchases from out-of-state sellers. The tax was "laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price." *Id.*, p. 43. And it was "conditioned upon events occurring" within New York, i. e., the "transfer of title or possession of the purchased property." *Id.*, pp. 43-44. Under the principle of that case, a buyer who accepted delivery in New York would not be exempt from the sales tax because he came from without the State and intended to return to his home with the goods. The present tax, to be sure, is on the seller. But in each a local transaction is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce. In neither does the tax aim at or discriminate against interstate commerce. The operation of the tax and its effect on interstate commerce seem no more severe in the one case than in the other. Indeed, if we are to remain concerned with the practical operation of these state taxes rather than with their descriptive labels (*Nelson* v. *Sears, Roebuck &*

Co., 312 U. S. 359, 363), we must acknowledge that the sales tax sustained in the *Berwind-White* case "was, in form, imposed upon the gross receipts from an interstate sale." Lockhart, Gross Receipts Taxes on Interstate Transportation and Communication, 57 Harv. L. Rev. 40, 87. But that case did no more than to hold that those in interstate trade could not complain if interstate commerce carried its share of the burdens of local government which helped sustain it. And there was no showing that more than that was being exacted.

The sales in Class E embrace those by an Indiana seller to an Indiana buyer where the goods are shipped from points outside the State to the buyer. The validity of the tax on receipts from such sales would seem to follow *a fortiori* from our recent affirmance *per curiam* (318 U. S. 740) of *Department of Treasury* v. *Allied Mills, Inc.*, 220 Ind. 340, 42 N. E. 2d 34. In that case an Indiana corporation had one factory in Indiana and two in Illinois. Each factory was given a specified part of Indiana to service—a method of distribution adopted to take advantage of favorable freight rates, not to evade taxes. The issue in the case was whether the Indiana gross income tax could be applied to receipts from sales to resident customers in Indiana to whom deliveries were made from the plants in Illinois pursuant to orders taken in Indiana and accepted in Illinois. The Indiana Supreme Court sustained the imposition of the tax. We affirmed that judgment on the authority of *Felt & Tarrant Co.* v. *Gallagher*, 306 U. S. 62, and *McGoldrick* v. *Felt & Tarrant Co.*, 309 U. S. 70.

In the latter cases the Felt & Tarrant Co. was an Illinois seller who had agents soliciting orders in California and New York. All orders were forwarded to the Illinois office for approval. If accepted, the orders were filled by shipping the products to the local agent who delivered to the purchaser. At times shipments would be made direct to the buyers. Remittances were made by the customers direct to the Illinois office. In the first of these cases the Court sustained the collection from the seller of the California use tax. In the second we upheld on the authority of *McGoldrick* v. *Berwind-White Co., supra*, the imposition by New York City of its sales tax on those purchases.

We do not see how these cases can stand if the Class E sales are to be exempt on constitutional grounds from the present tax.

Indeed the transactions in Class E have fewer interstate attributes than those in the *Felt & Tarrant Co.* cases since the agreements to sell were made in Indiana, both buyer and seller were in Indiana, and payments were made in Indiana. It is of course true that in the *Felt & Tarrant Co.* cases taxes of different names were involved. But we are dealing in this field with matters of substance not with dialectics. *Nelson* v. *Sears, Roebuck & Co., supra.* In this case as in the foregoing sales tax cases the taxable transaction is at the final stage of an interstate movement and the tax is on the gross receipts from an interstate transaction. In form the use tax is different since it is levied on intrastate use after the completion of an interstate sale. But we recognized in the *Berwind-White* case that in that setting the New York sales tax and the California use tax had "no different effect upon interstate commerce." 309 U. S. p. 49. And see *Nelson* v. *Sears, Roebuck & Co., supra.* The same is true of this Indiana tax as applied to the Class E sales. There is the same practical equivalence whether the tax is on the selling or the buying phase of the transaction. See Powell, New Light On Gross Receipts Taxes, 53 Harv. L. Rev. 909, 929. Each is in substance an imposition of a tax on the transfer of property. In light of our recent decisions it could hardly be held that Indiana lacked constitutional authority to impose a sales tax or a use tax on these transactions. But if that is true, a constitutional difference is not apparent when a "gross receipts" tax is utilized instead.

Here as in case of the other classes of sales there is no discrimination against interstate commerce. The consummation of the transaction was an event within the borders of Indiana which gave it authority to levy the tax on the gross receipts from the sales. And that event was distinct from the interstate movement of the goods and took place after the interstate journey ended.

Much is said, however, of double taxation, particularly with reference to the Class D sales. It is argued that appellants will in all probability be subjected to the Illinois Retailers' Occupation Tax for some of those sales, since that tax is said to be exacted from those doing a retail business in Illinois even though orders for the sales are accepted outside of Illinois and the property is transferred in another State.[5] But it will be time to cross that bridge when we come to it. For example, in the *Wood Pre-*

[5] See L. Ill. 1943, p. 1121, § 1 b, amending L. Ill. 1933, p. 924.

serving Corp. case the State to which the purchaser took the ties might also have sought to tax the transaction by levying a use tax. But we did not withhold the hand of Indiana's tax collector on that account. Nor is the problem like that of an attempted tax on the gross proceeds of an interstate sale by both the State of the buyer and the State of the seller. Cf. *J. D. Adams Mfg. Co. v. Storen, supra.* We only hold that where a State seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way. Such "local activities or privileges" (*McGoldrick v. Berwind-White Co., supra*, p. 58) are as adequate to support this tax as they would be to support a sales tax. To deny Indiana this power would be to make local industry suffer a competitive disadvantage.

Affirmed.

Mr. Justice JACKSON dissents.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.